United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

767

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23,617

UNITED STATES OF AMERICA,

Appellee

vs

ROGER A. WATTS,

Appellant

BRIEF FOR APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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CASES CITED

MISCELLANEOUS

*Chiefly relied upon.

*STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court below, in view of the extensive voir dire testimony of the jurors as to personal experiences as victims of larceny, burglary and robbery or close relationship to a victim of an assault, should have found the panel to be disqualified and called a new panel so that Appellant would be afforded a trial by an impartial jury panel.

2. Whether the in Court identification of Appellant by Young should have been suppressed in view of the pre-trial identification in violation of Amendment Six Rule.

3. Whether the evidence was insufficient to support the specific intent to commit robbery as required by the charge against Appellant.

Reference to rulings - none

* This case has been before this Court under same number and title and previous brief stricken on motion of Government herein.

STATEMENT OF PROCEEDINGS BELOW

The jury in the trial Court was impaneled and upon voir dire it became apparent that at least seven members of the jury panel had been victims or closely related to victims of criminal offenses of a similar nature (Transcript pages 12-21). Of these seven jurors, five were actually placed in the jury box. Two were challenged premptorily by the Defense Counsel; three remained on the jury. The trial proceeded and defendant was found guilty and sentenced to seven years imprisonment under 18-5010 (c), United States Code.

STATEMENT OF THE CASE

Miss Jannie V. Young left her apartment about 6:30 A.M. on August 22, 1968 to go to work. She proceeded out of her apartment building, down St. Louis Street to 49th Street and thereafter proceeded to 49th and Bass Place, S.E. There she noticed a negro male walking toward her. He appeared to be a dark-skin negro male, five feet six inches tall, weighing about 155 to 160 pounds and he had on a green shirt and dark trousers (Tr. P. 30, 36). The purse she carried had a shoulder strap and a flap that covered the zipper and was being carried on her shoulder. As this man was passing her, he suddenly grabbed from behind around the waist

with his right arm and she felt some kind of sharp object in her side (Tr. P. 30, 31, 33,39). She began screaming and the man told her to "Shut up", and when she continued to holler, he hit her on the right temple and face several times (Tr. P 40). She noticed her pocketbook falling to the ground. When it fell the contents spilled on the ground. She did not see this man touch her pocketbook at any time. The whole struggle lasted only 4 or 5 seconds when the man turned her loose and fled (Tr. P. 33, 34, 40). All of the contents of her pocketbook were recovered from the ground. She had over $200.00 in her purse at that time. The police were called and arrived at the scene of the alleged assault (Tr. P. 37, 41). Miss Young was placed in scout car at which time she gave a description of her assailant. The police broadcast a lookout for him and she was asked to ride with them in case the assailant was picked up to identify him. This she did. During this time she was driven to Benning Road and C Street where two policemen had a negro male. Right away, she identified him as the man who attacked her at 49th and Bass (Tr. P. 35-37). She identified the Appellant as the same man she had identified earlier at Benning Road and C Streets (Tr. P. 38).

Aaron Beane saw the assailant grab Miss Young at the time and

described by her. He was riding in a taxi with Roger Clark. He saw the assailant hit Miss Young on the side of her head with his hand. When they backed up in the cab the assailant ran toward a wooded area across C Street and escaped. He did not see the man's face so as to recognize him (Tr. P. 44-46).

Roger Clark also saw the assailant strike Miss Young on the side of her face. When they backed up, the man ran. He ran into the woods. Mr. Clark did not see his face but observed that the assailant was wearing a light blue T-shirt, like a sweat shirt, and green pants (Tr. P. 47, 49, 50).

Officer Henry J. Daly was on duty the morning of August 22, 1968. At about 6:30 he received a radio call and proceeded to respond to 49th and Bass Place, S.E. The lookout was for a negro male, about 16 to 18 years of age, dark complexion and wearing a maroon or red colored shirt, five feet five or six inches and about 150 pounds. While proceeding west, he came to C and Benning road where he saw the appellant wearing a maroon shirt. This attracted his attention. Subject was running toward woods and Officer Daly lost him due to thick foliage. When he came out of the woods he saw Officer Frazier putting hand cuffs on Appellant (Tr. 52-55). The two officers took Appellant immediately to the scout car and asked for the scout car which had the Complainant, Miss Young, on board to meet them at Benning and C Street. The scout car arrived and the Complainant pointed to

Appellant and said "That is the man" or something to that effect. The Appellant had been apprehended and held by Officer Frazier (Tr. P. 56-58). Officer Frazier saw a Negro fitting the description he had received coming out on Benning Road at C Street, wearing a maroon shirt and dark pants. He chased the man and upon his second call to stop the man stopped. This man was the appellant. A scout car pulled up alongside his vehicle after appellant was placed in the vehicle and Miss Young was asked if she knew appellant at which time she identified him (Tr. P. 61-63).

John Sellers testified appellant, his step son, took him to work that morning between 5 and 6 o'clock A.M. He arrived at work about 5:35. Appellant was driving his automobile (Tr. P. 73).

Grace Sellers, mother of appellant, gave appellant $365.00 in early August as a wedding gift. He was to be married August 24 and was to pick up his wedding clothes on the 22nd and go to an appointment for a job with PEPCO. She and Mr. Sellers had also given appellant an automobile for which they had paid $1,295.00. Appellant worked and had saved his own money (Tr. P. 76,79,81)

Appellant, Roger A. Watts, drove his step-father to work on August 22. On the way home, some young men threw rocks at his automobile and he stopped and chased them stopping one of them. After this boy ran off, he went back to his automobile but could not get it started. He left the automobile at 49th & B Street and was near an apartment on Benning Road when he saw a man running toward the

grave yard. An officer came up and slammed him up against a wall and patted him down. They took him to 14th Precinct. He had a savings account at Suburban Trust Company. There was money in the account. He could draw against it if he desired (Tr. P. 84-88).

STATEMENT OF POINTS

1. The Court below should have dismissed the jury panel and ordered a new jury panel for the trial of Appellant on the Court's own motion in view of the extensive testimony of the prospective jurors concerning their own personal experiences as victims of larceny or robbery, or their close relationship to other persons who were victims of such offenses.

Appellant requests the Court read the following parts of the transcript in connection with this point:

(a) From Line 4, page 12 through page 21 of the transcript.

2. The Court below should have suppressed the in Court identification of Appellant by the witness, JANIE V. YOUNG, on the ground that same was tainted by the out of Court identification of said witness of the Appellant without a lineup or without the advice of counsel or being advised of his right to have counsel present, which was a violation of Amendment VI procedure and plain error affecting the substantial rights of the Appellant.

Appellant requests the Court read the following parts of the transceipt in connection with this point:

(a) From Line 9, page 29 through Line 3, page 41;

(b) From line 2, page 50 through page 53;

(c) From line 3, page 54 through line 23 page 58;

(d) Pages 60 through line 10, page 63.

3. The evidence was insufficient as a matter of fact and law to establish the specific intent to commit robbery against the complaining witness by her assailant in view of the fact that she did not indicate in her testimony any res gesti statements of the assailant which would tend to establish the intent to commit robbery or any act of snatching or taking of her purse, and the Court below should have limited the jury to consideration of the offense of Assault and Battery.

Appellant requests the Court to read the following parts of the transcript in reference to this point:

(a) Pages 29 through page 41;

(b) Pages 44 through 50

(c) Pages 73 through 88

SUMMARY OF ARGUMENT

Trial by an impartial jury unaffected by external and unrelated circumstances is a right secured by Amendment VI of the Constitution of the United States of America. Where seven prospective jurors have been shown to be exposed to external and unrelated offenses to the case in point, being either past victims of larceny or robbery or closely related to persons who had been assaulted, the jury has been so exposed as not to be able to render an impartial verdict and should

have been discharged and a new jury impaneled, without objection or motion of appellant as being plain error affecting the substantial rights of the Appellant.

Likewise, Appellant's constitutional right to counsel has been plainly and substantially impaired by the police officers, after apprehending him, holding him for a viewing by the Complainant, JANIE V. YOUNG, without first affording him the right of counsel and a proper line up. Such type of exposure of an accused alone has been condemned as both unduly suggestive of a mistaken identity and violation of Amendment VI rules requiring him to be afforded the right of counsel and a proper lineup.

The evidence of record, viewed in its totality, would not support conviction of assault with intent to commit robbery in the absence of substantial evidence establishing the required specific intent.

A R G U M E N T

I.

A NEW JURY PANEL SHOULD HAVE BEEN ORDERED IN APPELLANT'S TRIAL IN VIEW OF THE EXTENSIVE TESTIMONY OF THE PROSPECTIVE JURORS CONCERNING THEIR OWN PERSONAL EXPERIENCES AS VICTIMS OF LARCENY OR ROBBERY OR THEIR CLOSE RELATIONSHIP TO OTHER PERSONS WHO WERE VICTIMS OF ASSAULT.

It seems rather superficial compliance with the substantial constitutional rights of an accused to accept at face value juror's statements of impartiality where the circumstances of the case shows that the entire panel sat there and heard seven of its prospective members relate that either they or their close relatives had, in the past, and some very recently past, been victims of larceny, burglary, robbery and assault. To accept this blindly completely ignores human nature and assumes that each juror remains test tube pure in the face of such prejudicial information. Furthermore, jurors, being only human, should not be put to labor under a duty as serious as judging their fellowmen under such circumstances.

This issue is not a novel issue but is one as old as trial by jury itself. It is embodied in Amendment VI of the Constitution of the United States and ruled upon by the Courts of our land.

The Sixth Amendment commands that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury---. Where prejudice is manifest, a trial Court's findings of juror's impartiality should be set aside. Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays no particular tests and procedure is not chained to any ancient and

artificial formula. Jackson vs United States, 129 U.S. App. D.C. 392, 395 F. 2d 615. While Jackson, supra, found no similar cases in the District similar to the facts of that bizarre case the Court therein said:

> "We have found no cases in this jurisdiction involving facts similar to the bizarre facts of the cast at bar. However, in United States ex cel DeVita vs McCorkle, 248 F. 2d 1 (3rd Cir.), cert. demid, 355 U.S. 873, 78 S. Ct. 121, 2 L Ed. 2d 77 (1957), the Third Circuit set aside a robbery conviction where it was disclosed at post trial hearing that a juror had earlier been a robbery victim (emphasis ours). -------The Court concluded that his potential bias constituted a denial of due process under the Fourteenth Amendment. Even more apposite is Durham vs State, 182 Tenn. 577, 188 S.W. 2d 555, 160 A.L.R. 746. There a juror in a rape case had previously been a prosecution witness in an assault with intent to rape case,---In reversing the conviction the Tennessee Supreme Court said:
>
> 'Surely, it requires no argument to convince that a man so circumstanced would not enter upon a trial of this accused free from the natural feeling of resentment which had moved him to institute and keep alive a prosecution for a like offense. As this case progressed his mind inevitably would turn to his own unsatisfied wrong and his judgment would be so affected thereby as to deprive him of the capacity to act, impartially, disinterestedly and dispassionately.' "

Thus, where a juror was involved in a similar experience to that before the Court it has been held that his presence on the jury amounted to prejudice of a Constitutional Right. Sims vs United States 132 U.S. App. D.C. 111, 405 F. 2d 138L.

From this, it is clear that the Courts not only consider such risk a violation of the Constitutional right to an impartial jury trial but also plain error affecting the substantial rights of the Appellant. Under the circumstances Appellant invokes the review of this Court under Rule 52(b), Federal Rules of Criminal Procedure. What irony it would be to say that this Appellant is not entitled to the protection of a plain constitutional right by virtue of the failure of our Courts and counsel to seek such protection in a clearly disclosed case. It is therefore urged that judgment below be reversed and a new trial directed.

II.

THE IN COURT IDENTIFICATION OF APPELLANT BY THE WITNESS, JANIE V. YOUNG, SHOULD HAVE BEEN SUPPRESSED AND STRICKEN IN VIEW OF THE PLAIN ERROR IN VIOLATION OF APPELLANTS' AMENDMENT VI CONSTITUTIONAL RIGHT TO HAVE COUNSEL PRESENT, AND TO BE SO ADVISED, AT ANY OUT OF COURT IDENTIFICATION VIEWING OF HIM, AND THE SUGGESTIVE AND ERRONEOUSLY TAINTED VIEWING OF HIM BY SAID WITNESS WITHOUT A LINE UP.

It has been clearly established that Amendment VI procedure, Constitution of the United States, in any criminal case arising since June 12, 1967, requires that an accused be advised of and afforded the opportunity to have counsel of his own choice or properly appointed

for him present at all stages of the case, including but not limited to any identification viewing by a witness for the prose-cution. Such pretrial viewing is violation of this rule whereby an accused is identified as the perpetrator of the alleged offense is so tainted with illegality that subsequent in Court identifications of the accused by said witness must necessarily be suppressed. The trial which may well determine the accused's fate may well not be that in the Courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the Witness----"that's the man".---- To refuse to recognize the right of counsel for fear it may obstruct justice is contrary to the precepts established by the Sixth Amendment cases. The lineup is most often used to crystallize the witness' identification of the defendant for future reference. Obviously, in the present case, rushing the Complainant to the place where Appellant was held was for that purpose. United States vs Wade, 388 U.S. 218, 87S Ct. 1926, 18 L. Ed. 2d 1149, 1162, 1163, 1164; Gilbert vs California, 388 U.S. 263, 87 S.Ct. 1951, 18 L. Ed 2d 1178. The state is not entitled to show that testimony had an independent source. Only a per se exclusionary rule can be an effective sanction to assume that law enforcement authorities will

respect the accused's constitutional right to presence of counsel at the critical viewing. This is particularly pointed up where the prosecution used the witness' out of Court identification to corroborate and buttress the in Court identification. In Wade, supra the Court said:

> "And the vice of suggestion created by the identification in Stovall, supra, was the presentation to the witness of the suspect alone handcuffed to the police officers. It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police."

Unfortunately for Stovall, the Amendment VI rule of Wade and Gilbert was not retroactive and under the totality of the circumstances, the Court did not find that his Amendment V rights had been substantially impaired. Stovall vs Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed 2d 1199.

In the present case, we are not confronted with the retroactivity of the application of the rule established under Wade and Gilbert, the offense in the instant case being alleged to have occurred on August 22, 1968. This case should therefore, be reversed and remanded for a new trial or other proper action.

III.

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF FACT AND LAW TO ESTABLISH THE SPECIFIC INTENT TO COMMIT ROBBERY IN VIEW OF THE FACT THAT NO SUBSTANTIAL EVIDENCE WAS PRESENTED TO SHOW ANY RES GESTI STATEMENTS OF HER

ASSAILANT TENDING TO SHOW AN INTENT TO ROB NOR WAS THERE ANY ACT OF SNATCHING OR TAKING HER PURSE, AND THE TRIAL COURT SHOULD HAVE GRANTED APPELLANT'S MOTIONS FOR JUDGMENT AT LEAST TO THE EXTENT OF LIMITING THE JURY TO CONSIDERATION OF THE OFFENSE OF ASSAULT AND BATTERY.

In the case of Hammond vs United States, 75 U.S. App. D.C. 397, 127 F. 2d 752, the Court dealt with specific intent to commit an offense, which in that case was the intent to commit rape. Factually, that case certainly disclosed more circumstances to support a conclusion of an intent to rape than the present case presents on the intent to rob. The elements of the present offense are similar in that it also requires (1) an assault (2) the specific intent to commit robbery and (3) the overt act of attempting the robbery itself, all of which elements must be shown beyond reasonable doubt and to the exclusion of any other reasonable hypothesis of intent. The Court in Hammond said:

> "In the present case there was, as there always is in a criminal prosecution, a legal presumption that appellant was innocent until proved guilty beyond a reasonable doubt. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial Judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the Appellate Court to reverse a judgment against him. Isbell vs. United States, 8 Cir., 227 F. 788, 792. ----

"In the light of the circumstances, ---we think it impossible that a jury of reasonable men could have fairly reached the conclusion that Appellant, in what he did, necessarily intended (emphasis ours) to commit rape. True enough, his intent can only be determined by his acts.---the conclusion that he intended rape would be pure conjecture. ---That he was guilty of a (another, sic) serious offense goes without saying----but that he was guilty of attempted rape we think may not be inferred from the evidence on which the Government relied. ----"

Likewise, in the present case, other unlawful intents could be equally drawn from the evidence. First, her assailant could have entertained intent to solicit an illicit relationship. Whether believable or not, the Government put on evidence above which it cannot rise, to that effect in the testimony of Roger S. Clark quoted in part:

"----Q. Now, sir, at that time at that place, did anything unusual occur?

A. Yes, it was unusual. I was on my way to make a left turn onto 49th Street and I saw two people on 49th Street. It seemed, at first, they were just talking. ----(P. 47)

"A. When I first saw them when I was approaching 49th and C Streets and I saw two people and it looked to me as if they knew each other the way they were holding on to each other in the street, when I first saw them. ---- (P. 51)"

This witness, from what he saw, jumped to a conclusion which is not necessarily true or warranted by the other evidence. Should we also allow a jury to jump to a conclusion which may be probably but not necessarily true? If it is conjectural for Clark to conclude they knew each other and that they were just talking when he saw them, isn't it even more conjectural for a jury to conclude a specific intent to rob where there was no conversation at all from which one could

draw an inference of an intent to rob? Neither the victim, Miss Young, nor the other witness related anything to support an intent to rob. All the evidence shows that the assailant was holding or hitting Miss Young with his arms. Only Mr. Clark jumped to the conclusion, again, of anything resembling robbery. He said:

> "----Well, they were tussling. She had her pocketbook in her hand, and he had his arm under her pocketbook and around her shoulder and he seemed to be going into her pocketbook." (Emphasis ours)

This is quite unbelievable, improbable and unsupported by the other facts. In some manner, impossible on its face, the assailant, behind her at the time, had his arm around her shoulder, yet under her pocketbook and seemed to be going into her pocketbook. He also said she had the pocketbook in her hand. The evidence showed the pocketbook to be hanging from one of her shoulders by a strap. She was grabbed around the waist, and hit in the face at about the same time. All of this occurred in four or five seconds. If true, the zipper was closed and under a flap, a screaming struggle going on in which the pocketbook fell to the ground. Nothing was missing. No attempt to jerk, snatch or forcibly take the purse was shown. This was obviously not the kind of case to support an intent to stealthily pickpocket her. Therefore, Appellant contends the evidence, at most, would support only a conviction of assault and battery and the judgment in this case should be reversed and a new trial ordered on the offense of and battery if otherwise supported by admissible evidence and identification.

CONCLUSION

It is respectfully concluded that the verdict and judgment of the Court below should be set aside and reversed and a new trial ordered consistent with the positions taken by Appellant on admissibility of evidence and intent as set forth in the points and argument above, or should it appear to this Court that, in view of the law as presented herein and found by this Court, the admissible evidence would not support or justify a retrial of this case, same be ordered dismissed.

Respectfully Submitted,

Roland D. Hartshorn
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CERTIFICATE OF SERVICE

Two copies of said Brief of Appellant have been duly served upon the United States Attorney for The Districtof Columbia by delivering copies of same to his offices at the U.S. Courthouse, 3rd Street and Constitution Avenue, N. W., Washington, D. C. on the _____day of _____, 1970.

Roland D. Hartshorn

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23,617

UNITED STATES OF AMERICA — APPELLEE

V.

ROGER A. WATTS — APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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TABLE OF CASES

No cases cited.

REFERNECES TO RULINGS

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The Court Ruled to admit Evidence of Defendant TR 71

* STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Appellant had effective Assistance of Counsel.

TR 15.

* This case has not been before this Court before under this or any other Title.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 23,617

UNITED STATES OF AMERICA — APPELLEE

V.

ROGER A. WATTS — APPELLANT

APPEAL FORM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLANT

STATEMENT OF CASE

Appellant was indicted by the September 1968 Grand Jury of a one (1) count indictment for violation of 22 D.C. Code 501

(assault with intent to commit robbery) against Janie V. Young. Appellant was brought to trial before Judge William B. Bryant on May 13 & 14 1969.

Appellant was found guilty by a Jury and sentenced to serve seven (7) years under 18 U.S.C. 5010(c).

APPELLANTS'S STATEMENT OF CASE

Appellant stated that he took his stepfather to work early in the morning of August 22, 1968 and upon returning home some boys threw some objects at his car. He furhter stated that he stopped his car and gave chase, whereupon he was arrested on this charge.

The complaining witness made a positive identification and Appellant denies any knowledge of the crime. Therefore the issue, except for trial counsels's error (who is appellant counsel) is credibility of the identification and Appellants's denial.

ARGUEMENT

Issue 1. Ineffective Assistance of Counsel; TR 15 and 145:

Counsel admits prejudicial error in selecting the Jury for Appellants trial.

At Tr 15 when Appellants trial counsel examined the prospective Jury, Mr. James E. Dietel stated that he had some reservation about serving on the Jury.

Counsel further admits that he should have challenged him for cause, or in the alternative used a pre-emptory challenge to remove said juror.

This neglect was gross negligence on his part and he believes that the fact could have so prejudiced Appellants case as to amount to Ineffective Assistance of Counsel.

This is further established by the fact that the Jury had some doubt and sent a note asking for the Police Officer's testimony (see TR 145).

Counsel has no way of knowing how the doubt was resolved or why, or in fact whether this juror had any influence at all on the other members.

However, counsel feels constrained to confess that he does not believe that it could be ruled that Appellant did in fact have a fair trial.

Counsel reaches this conclusion in the belief that the case was resolved on the basis of credibility, and could have been resolved in Appellant's favor if this juror had not served.

Counsel has reviewed this case and finds no other grounds for arguement.

CONCLUSION AND RELIEF SOUGHT

Counsel confesses prejudicial error and prays that this Honorable Court will grant Appellant a new trial.

Respectfully Submitted:

James W. Respess
Attorney For Appellant
Appointed By This Court

NOTIFICATION OF SERVICE

I certify that a copy of this brief was delivered to the United States Attorney this 7th day of February, 1970.

James W. Respess